(2)

No. 04-1303

In the Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly found that under the circumstances presented in this case, the Petitioners were obligated to provide Baird with a pre-termination hearing that fully complied with due process.

2. Whether the Seventh Circuit correctly decided that under the circumstances of this case, when a public employee is terminated for cause, and when the only available post-termination remedy is the opportunity to bring a breach of contract lawsuit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirement of bare notice and opportunity to be heard.

3. Whether the Seventh Circuit correctly found that the individual defendants are not entitled to qualified immunity.

LISTING OF PARTIES TO THE PROCEEDING

The petition correctly state the names of all parties to this case.

STATEMENT PURSUANT TO RULE 29.6

Respondent is an individual and thus no disclosure statement is required pursuant to Rule 29.6.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Kelly Baird ("Baird") respectfully opposes the petition for writ of certiorari and requests that the petition be denied.

JURISDICTION

The jurisdictional statement set forth in the petition correctly sets forth jurisdiction.

INTRODUCTION

This Court decided *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) some twenty years ago. *Loudermill* definitively held that a public employee with a protected property interest in continued employment has a right to pre-termination due process. In approving less than a full pre-termination hearing – one without a right to representation by an attorney or notice as to the evidence against him or the right to cross-examine witnesses – this Court explicitly relied upon a state statute which gave such rights in a prompt post-termination administrative proceeding: "Our holding rests in part on the provisions in Ohio law for a full post-termination hearing." 470 U.S. at 546.

The Seventh Circuit's appropriately strong worded opinion ("Opinion") correctly found that the shameful "kangaroo court" procedures utilized by Petitioners in this case missed the constitutional mark "by a country mile." The Opinion's core holding is that when a public employee possessing a property interest is fired for cause, when there are no prompt post-termination administrative or contractual procedures made available, and when the terminated employee

is relegated to a time consuming and expensive state court breach of law contract lawsuit, that employee is entitled to full pre-termination due process before he is fired.

This rule clearly flows from *Loudermill*. It is a rule which has been followed by every federal circuit and state appellate court considering the issue. It is a rule which was clearly evident at the time these "petty and maladroit" Petitioners decided to fire Baird. The Opinion is correct. It is fair. Perhaps most importantly, it will promote reasonable resolution of employment disputes in similar contexts.

Because the Opinion is consistent with this Court's jurisprudence, as well as every case considering the issue, the petition should be denied. Baird should finally have the opportunity to have his case heard by a jury.

STATEMENT OF THE CASE

Petitioners understandably give short shrift to the facts of this case. The Opinion found the undisputed facts demonstrate appalling conduct by the defendants. While the Opinion correctly sets forth the facts, we believe it is important for this Court to review the facts in full. Page references are to the Record before the Court of Appeals.

In August, 2000, the Board hired Kelly Baird as Superintendent of Schools and Principal of Warren, Illinois School District 205 (collectively, "Superintendent") (Doc. #27, 56.1(a)(3) stmt, ¶5; Doc. #19, Ans., ¶6). The parties signed a three-year contract (the "Agreement"). (Doc. #27, ¶8; Doc. #19, ¶9). The individual defendants were among the members of the Board of Education (Doc. #27, ¶3).

The Agreement covered the 00-01, 01-02, and 02-03 school terms. The Agreement was subject to termination for cause. By virtue of the term of the Agreement and the limitations regarding bases for termination, the Agreement conferred Baird a property interest in continued employment entitling him to due process in connection with the deprivation thereof. *Id.*

Shortly after Baird was hired, Defendants Cleary, Vincent and Stephan began talking to District employees, who would give them information complaining about Baird. (Doc. #48, ¶1; Doc. #47, Vol. 2, Exh. D, Cleary dep., pp. 154-5; Exh. I, Vincent dep., pp. 21-23).

The Agreement required Baird to attend regional conferences. (Doc. #48, ¶4). Between October 4-6, 2000 Baird attended at the Illinois State Board of Education's 23rd Annual Superintendent's Conference. (Doc. #48, ¶5; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 1). The Conference was held at a hotel in Springfield, Illinois and the District paid for Baird's registration. *Id.* The phone number of the hotel was listed on the registration form that was in the possession of the District offices. *Id.* The Board expected Baird to attend the conference. *Id.*

On October 5, 2000, a problem occurred with the public water supply to Apple River School. A "boil order" was issued. (Doc. #48, ¶6; Doc. #47, Vol. 2, Exh. D, p. 118). Cleary became aware of the problem and was upset that Baird was not present in the School District on that date . (Doc. #48, ¶7; Doc. #47, Vol. 2, Exh. D, pp. 121, 148). Cleary never asked Baird where he was. He was at the conference. Instead, she concluded he simply was derelict in his duties. (Doc. #48, ¶8; Doc. #47, Vol. 2, Exh. D, pp. 121, 148). Cleary then met with one of the school secretaries, Sally

Roberts. (*Id.*; Doc. #47, Vol. 2, Exh. D, pp. 121-128, 158-159). Cleary did not advise Baird that she was talking to Roberts. *Id.* Roberts furnished Cleary with a list of dates Roberts was compiling regarding Baird's whereabouts since the beginning of the 2000-2001 school term. *Id.*

On October 10, 2000 Cleary submitted a memorandum to Baird. (Doc. #48, ¶9; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2; Doc. #47, Vol. 2, Exh. D, pp. 148-149). The memorandum was purported to be jointly authored by Cleary and Stephan. (Doc. #48, ¶9; Doc. #47, Vol. 2, Exh. H, Stephan dep., pp. 27-28). In the October 10 memo, Cleary expressed that both she and Stephan had "substantial concern about our ongoing relationship," and complained Baird was "unavailable a great deal of the time." (Doc. #48, ¶10; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2). Cleary had no first-hand knowledge regarding Baird's attendance. (Doc. #48, ¶10). Cleary also complained about the fact that Baird had purchased a cell phone, but did not use a local vendor. (Doc. #48, ¶10; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2).

Cleary's memorandum falsely represented to Baird that Stephan was "concerned that the morale of the faculty and staff was very low. . .a sign that mutual respect is not being built." Cleary admitted she had no basis for that statement. (Doc. #48, ¶12; Doc. #47, Vol. 2, Exh. D, p. 134). Cleary claimed that a number of employees came up to her and told her morale at the school was bad, but Cleary never mentioned any of these names to Baird. (Doc. #48, ¶17; Doc. #47, Vol. 2, Exh. D, p. 155). In contrast to her October 10 memo and assertions regarding what employees told her, Cleary testified in her deposition that she told Baird "Our teacher morale was high and we'd like to keep it there." (Doc. #48, ¶14; Doc. #47, Vol. 2, Exh. D, p. 134).

Although Cleary claims she was not aware that Baird was fulfilling his contractual duties at the Superintendents Conference on the date that the boil order was issued, Stephan was aware of it, knew that the contract called for him to go to conferences such as the October 5 conference, and had no criticism of Baird for going to the conference. (Doc. #48, ¶13; Doc. #47, Vol. 2, Exh. H, p. 31). Baird's absence from the District on the "boil order" day was later used as a basis for his termination.

Stephan and Cleary met with Baird on October 10, 2000. (Doc. #48, ¶15; Doc. #47, Vol. 2, Exh. H, p. 39). Stephan never told Baird she was concerned with him leaving early on Friday and arriving late on Monday. *Id.* In response to the concerns expressed by Stephan and Cleary, Baird agreed that he would limit his out of District activities even though he pointed out that these activities generally took place in the fall. (Doc. #48, ¶15). Among other things, Baird cancelled his proposed attendance at a law conference sponsored by the School District's law firm that was scheduled for the following day, October 11, 2000. (Doc. #48, ¶15; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 3).

During the October 10, 2000 meeting the parties also discussed Baird's cell phone purchase. (Doc. #48, ¶16). Although Cleary said she "didn't think of the cell phone being a problem," she was upset that Baird did not use a local vendor. (Doc. #48, ¶16; Doc. #47, Vol. 2, Exh. D, p. 152). Stephan was similarly upset, even though she had no idea of the cost implication of Baird's decision. (Doc. #48, ¶16; Doc. #47, Vol. 2, Exh. A, pp. 35-36). There are no Board rules requiring the use of local vendors. (Doc. #48, ¶16).

Unbeknownst to Baird and most of the other Board members, Cleary and Vincent engaged in a clandestine

"investigation" of Baird. They directed a member of the clerical staff to put together a listing of his whereabouts. (Doc. #48, ¶19; Exh. 2; Doc. #47, Vol. 2, Exh. D, p. 158). This was done without any authorization of the Board of Education. (*Id.*; Doc. #47, Vol. 2, Exh. D, p. 140).

Cleary and Vincent began to meet and talk about getting rid of Baird. (Doc. #48, ¶20; Doc. #47, Vol. 2, Exh. D, pp. 161-62 and Exh. I, Vincent dep., p. 39). Vincent was performing her own "investigation" into Baird. (Doc. #48, ¶20). An employee told Vincent that Baird had thrown away old files belonging to the School District. (Doc. #48, ¶20; Doc. 47, Vol. 2, Exh. I, p. 23). Vincent never checked with Baird as to the nature of the files, whether they were of any value to the District, or whether they were appropriate for disposal. *Id.* In spite of having absolutely no knowledge of what was in the files and without ever consulting Baird, Vincent concluded this was an exercise of "poor judgment" by Baird. (Doc. #48, ¶20; Doc. #47, Vol. 2, Exh. I, pp. 28-29).

Vincent also concluded Baird was "lapsing" into nonattendance in late October, but she never mentioned the matter to the Superintendent, even though she frequently came to the school building to drop her daughter off at school. (Doc. #48, ¶21; Doc. 47, Vol. 2, Exh. I, pp. 30-31). After Cleary and Vincent obtained the list from the secretary regarding Baird's alleged whereabouts during September and October 2000, they continued their unauthorized "investigation" of Baird. (Doc. #48, ¶22; Doc. #47, Vol. 2, Exh. D, pp. 38-39).

Cleary and Vincent met on multiple occasions in late October and early November to assemble their views about Baird into written form for distribution to the Board. (Doc.

#48, ¶23; Doc. #47, Vol. 2, Exh. D, p. 161). As a result of these meetings, Cleary and Vincent prepared two drafts of a confidential memorandum to their fellow Board members. (Doc. #48, ¶23; Doc. #47, Vol. 1, Exh. A, dep. exh. 4, 4A). The two memoranda are substantially the same, except Exhibit 4's ten point "Opinion Statement" setting forth the view of Cleary and Vincent was edited out of the Exhibit 4A final version that was distributed to the Board members. (Doc. #48, ¶24). The memorandum included the secretary's reports setting forth Baird's supposed whereabouts. *Id.*

In the opening paragraphs, Vincent and Cleary frankly admitted that "neither of us feels that Dr. Baird is a 'good fit'" with them. (Doc. #48, ¶25). Cleary meant she decided Baird was not committed to the school district. (Doc. #48, ¶25, fn. 1; Doc. #47, Vol. 2, Exh. D, p. 165). Vincent meant that she was not "happy with the whole situation." (Doc. #48, ¶25, fn. 1; Doc. #47, Vol. 2, Exh. I, p. 37).

Both Cleary and Vincent admitted in their depositions that the ten point Opinion Statement accurately reflected their view of Baird as of November, 2000, less than three months after Baird started his job. (Doc. #48, ¶28; Doc. #47, Vol. 2, Exh. D, p. 196 and Exh. I, pp. 51-52). It was the opinion of Cleary and Vincent that Baird: 1) "Has no intention of being a principal for our elementary students"; 2) "Has little or no respect from the faculty or staff."; 3) "Has put little or no effort into engaging our students in anything."; 4) "Has no respect for us or our District."; 5) "Has no respect for our financial well-being"; 6) "Is not providing a desirable image of our community."; 7) "Is not providing support to our junior high/high school Principal."; 8) "Has questionable judgment."; 9) "Is increasingly difficult to trust."; and 10) "Has questionable value to the District." (Doc. #48, ¶29).

The Vincent-Cleary Memorandum was disseminated to some, but not all of the Board members; for example, Green did not receive a copy. (Doc. #48, ¶30; Doc. #47, Vol. 2, Exh. F, Green dep., p. 13). Even though the Board of Education had a meeting a few days later (November 15, 2000), the Board members never discussed the Vincent-Cleary memo at that time or at any other Board meeting. (Doc. #48, ¶31; Doc. #47, Vol. 2, Exh. H, p. 61). The Board did not share the memorandum or any of the underlying concerns with Baird at any time during Baird's employment. (*Id.*; Doc. #47, Vol. 2, Exh. H, pp. 57, 61).

By letter dated December 5, 2000, Vincent sent a two-page letter (the "Vincent Memorandum") to Stephan regarding rumors she had heard about Baird. (Doc. #48, ¶41; Doc. #47, Vol. 1, Exh. A, dep. exh. 7). Vincent was continuing her "investigation" of Baird by having a secretary give her Baird's cell phone records. (Doc. #48, ¶41; Doc. #47, Vol. 2, Exh. I, p. 70). Among other things, the Vincent Memorandum states:

- That Vincent is "so disgusted by his performance that I have not done a thing to help with the forthcoming referendum." [Emphasis added]

- That Cleary has asked Vincent to ask the school secretary "about the phone records" of Baird since Cleary was told that Baird was having extended cell phone conversations with a woman.
- That the secretary also told Vincent Baird was interviewing for another job in Fox Lake, Illinois. Vincent expressed this acid view about Baird: "Unfortunately, my baby sister, a sister who is due to have a baby in 2001, lives in Fox Lake–I'd

be concerned, but I'm sure [Baird] won't be there in five years ..."

- That "my opinion is that he cannot leave too quickly–yesterday would have been fine with me." [Emphasis added]

Vincent closes with this rhetorical question:

I wonder if we should call our attorneys about our rights and responsibilities if he breaks his contract. I hesitate to do it since they charged us over $1400 to change about ten words in the contract, but if he doesn't break the contract–I would sure like to ... Please let me know what you think ... [Emphasis added]

By this time Vincent had concluded that Baird was not "working for the District." (Vincent 77). Vincent never told her fellow Board members about her continuing investigation. (*Id.*; Doc. #47, Vol. 2, Exh. I, p. 72). Stephan never reviewed the Vincent Memorandum with the Board and never spoke to Baird about it. (Doc. #48, ¶47; Doc. #47, Vol. 2, Exh. H, pp. 79-80).

When the Board of Education met to evaluate Baird, each Board member filled out the evaluation form and gave their forms to Vincent. (Doc. #48, ¶74). After consulting with the school attorney, the Board designated Vincent to prepare the Evaluation, in spite of her attitude displayed in the December Letter, her hatred of Baird, and her expressed desire to break Baird's contract ("... if he doesn't break the contract, I would sure like to ..."). (*Id.*; Doc. #47, Vol. 2, Exh. H, pp. 93-94). The Board Members did not make any changes to Vincent's draft. (Doc. #48, ¶75; Doc. #47, Vol. 2, Exh. H, p. 96).

As Board President, Stephan did not believe that it was necessary for the Board–as a group–to hear from any of the individual accusers who had spoken to one or more of the Board Members on an individual basis. (Doc. #48, ¶76; Doc. #47, Vol. 2, Exh. H, pp. 102-103).

On or about April 18, 2001, the Board presented Baird with a document described as an evaluation of his performance as Superintendent during the 2000-'01 school year (the "Evaluation"). (Doc. #27, ¶15; Doc. #47, Vol. 1, Exh. A, Dep. Exh. 9). The Board also presented Baird with a letter dated April 18, 2001. (Doc. #27, ¶15 and Exh. 5; Doc. #19, ¶23). The letter notified Baird of the Board's intent to terminate the Agreement (Doc. #27, ¶16 and Exh. 5).

In a May 1, 2001 letter to Board President Stephan, Baird's attorney requested a hearing. (Doc. #27, ¶17). Baird also requested copies of underlying documents and the names and addresses of the numerous unnamed individuals whose reports furnished much of the basis for the Evaluation. (*Id.* and Exh. 6; Doc. #19, ¶24). The letter also requested that Board members Stephan, Vincent, Cleary and Gates recuse themselves. (Doc. #27, ¶17 and Exh. 6).

The attorneys for the Board of Education responded in writing a few days later. (Doc. #27, ¶18 and Exh. 7; Doc. #19, ¶26). The letter denied Baird's request for the enumerated documents; denied the request for names; denied a continuance; advised that the Board would not "call witnesses to testify, or present documents other than that which Baird already received; his evaluation instrument." (Doc. #27, ¶18 and Exh. 7). The letter set forth the Board's legal position "that the due process required under these

circumstances is the right to receive notice and the opportunity to be heard." *Id.* The letter also advised that at the informal hearing a single Board member "will present the case" against Baird. *Id.* The letter limited Baird's ability to question Board members; the attorneys "will require that questioning of Board members be limited to...issues on which he or she spoke." *Id.*

On May 16, 2001, Baird's attorney responded to the May 9, 2001 letter. (Doc. #27, ¶21; Doc. #19, ¶26), objecting to the procedures to be used. That same night, the Board convened for purposes of the hearing. (Doc. #27, ¶22). Baird appeared at the hearing and protested what he claimed to be contractual and due process violations. *Id.* The Board proceeded to consider Baird's termination. (*Id.*; Doc. #19, ¶28.). At the conclusion of its deliberation, the Board of Education voted to terminate the Agreement purportedly for cause. (Doc. #27, ¶23). Subsequent to the Board's May 16, 2001 vote, the Board forwarded to Baird a copy of a Resolution of Termination. (*Id.* and Exh. 9; Doc. #19, ¶29).

THE OPINION

The Opinion came down on November 14, 2004. 389 F.3d 685 (7th Cir. 2004). The Opinion carefully reviewed this Court's procedural due process jurisprudence. After reviewing *Loudermill* and this Court's caution that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures," the Opinion held that "a post-termination law suit for breach of contract" does not "remedy the full due process deficiency in the pre-termination proceedings."

The Opinion next turned to this Court's decision in *Lujan v. GNG Fire Sprinklers, Inc.*, 532 U.S. 189 (2001). Unlike

Lujan, the Opinion found that this case clearly involves "a present entitlement" to continued employment. After reviewing various cases which this Court distinguished in *Lujan*, such as *Barry v. Barchi*, 443 U.S. 55 (1979), *FDIC v. Mallen*, 486 U.S. 230 (1988) and *Sniadach v. Family Finance Corporation of Bayview*, 395 U.S. 337 (1969), the Opinion found that the "post-deprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to restore the claimant to possession ... The remedy [must be] available before the loss has become complete and irrevocable." 389 F.3d 692.

The Opinion then found that a state court breach of contract action "is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing." *Id.* The Opinion reaches the common sense conclusion that a time consuming and burdensome state court lawsuit does not satisfy the due process requirement of promptness. The Court also noted other aspects of the significant private interests at stake. The Court then concluded that when a public employee had a present entitlement procedural due process interest, and when the only available post-termination remedy is the opportunity to bring a state court breach of contract action, the pre-termination hearing to which the employee is entitled "must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirement of notice and an opportunity to be heard."

Applying the rule to the present case, the Opinion found the "undisputed" fact that Baird had a protected property interest in remaining in his position under his contract for the remaining two years and in being compensated accordingly.

Baird's present entitlement also meant that he had a right to seek reinstatement if his rights had been violated. The Opinion accordingly found that "the Board was obligated to provide a pre-termination hearing that fully complied with due process." 693. This it failed to do.

Turning to the actual process which was provided, the Opinion saw through the same misrepresentations being made by Petitioners to this Court; namely that Petitioners had provided Baird with reasonable pre-termination process. The Opinion found that while "Baird was ostensibly afforded the opportunity to call and question witnesses, the Board effectively emasculated this provision by refusing to furnish him with the names of district employees who had acted as undercover school board informants. Baird was allowed to question board members – but only about matters as to which they had spoken. What the Board gave to Baird with the left hand, it seemed to take away with the right, leaving Baird with a pre-termination hearing that may have satisfied a bare bones *Loudermill* standard, but little else."

As to the argument that the passage of time has now exceeded Baird's contract term, the Opinion correctly found that the kind of remedies that conform to due process "must be available promptly and must generally include the possibility of reinstatement. Otherwise they are not adequate to address the loss of a present entitlement."

The court noted that its ruling was completely consistent with the "persuasive reasoning" of the Tenth Circuit in *McClure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000). 693. *McClure* held that a school principal who is terminated in mid-term has a procedural due process right to confront and cross-examine on a pre-termination basis. *McClure* "underscores the importance of

cross-examination here, for the opportunity for confrontation was even more fully denied here where Baird was deliberately prevented from ascertaining the identify of his accusers." The Opinion further noted that "Seventh Circuit precedent is to the same effect." *Id.*

The Opinion next held that Baird did not waive his right to a fair hearing by refusing to participate in an unfair hearing. The court found that "under the present facts, when the plaintiff has requested reasonable safeguards and has been flatly denied both before and at the hearing and when nothing useful could apparently be gained by continuing participation, we will not find a waiver as a matter of law." 695.

Finally, the Opinion rejected the contention that the individual board members were entitled to qualified immunity. 696. The procedures they utilized "were severely deficient." The Opinion concluded that since numerous cases have defined the contours of what process is due to a public employee, the Opinion found that the law on this point was clearly established. The case has now been remanded for trial.

REASONS FOR DENYING THE PETITION

The Opinion is faithful to this Court's procedural due process cases. Its holding is consistent with every court of appeals decision considering similar questions. Three courts of appeals have now considered the precise question here and all have reached the identical conclusion: when a prompt post-deprivation hearing is not available, procedural due process requires that the pre-termination hearing provide a public employee with essential elements, such as right to representation by counsel and right to confront and cross-examine his accusers.

A. The Opinion is Consistent with this Court's Procedural Due Process Jurisprudence

Loudermill makes it clear that the abbreviated pre-termination hearing serves only "as an "initial check" against wrongful termination in light of the government's contravaling interest in removing a potential disruptive employee. *Loudermill* found that minimal due process was sufficient because of "the provisions of Ohio law for a full post-termination hearing." 470 U.S. 546. Under Ohio law, "a discharged civil service employee was entitled to administrative proceedings" by virtue of a prompt hearing with the State Personnel Board. 470 U.S. at 539-540, n.6.

Twelve years later, this Court decided *Gilbert v. Homar*, 520 U.S. 924 (1997). *Gilbert* underscored this point that a public employer may rely on a minimal *Loudermill* hearing only if there is a prompt post-termination hearing mechanism. "In [*Loudermill*] we concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination to be followed by a more comprehensive post-termination hearing." 520 U.S. at 929. Taken together, *Loudermill* and *Gilbert* hold that a public employer may provide a minimal pre-termination *Loudermill* hearing if – and only if – that public employer follows up by making available a prompt post-termination hearing providing fully adequate due process. *Gilbert's* conclusion flows inevitably. It is the conclusion this Court recognized in 1987 when it underscored that a minimal *Loudermill* hearing is appropriate only if "a prompt opportunity for complete administrative and judicial review is available." *Brock v. Roadway Express*, 481 U.S. 252, 261-262 (1987). *Gilbert* itself was a suspension case. The court found that minimal pre-suspension process was constitutional only so long as the

suspended employee "receives a sufficiently prompt post-suspension hearing ..." 520 U.S. at 932.

Petitioners have not cited one decision from any jurisdiction holding that notwithstanding a public body's responsibility to provide full procedural due process before termination of a tenured public employee becomes final, a state court breach of contract action provides such process. The Seventh Circuit was correct in determining that *Lujan* does not change this universal line of reasoning in the public employee context. *Lujan* did no even mention *Loudermill*. This Court found that a state court breach of contract action was adequate due process only because the claimant was not "denied a right ... he was presently entitled to [such as the right to] pursue a gainful occupation." *Lujan*, 532 U.S. at 196. *Lujan* distinguished *Barry v. Barchi, supra*. The racetrack trainer in *Barry* was suspended for a mere 15 days on suspicion of horse drugging. This Court found he was entitled to a prompt post-deprivation administrative or judicial hearing to lift that suspension by virtue of the present entitlement embodied by his trainer's license. The Opinion correctly recognized that a school superintendent being fired deserves no less than the racetrack trainer, and that *Lujan* does not affect these clearly established principles.

Lower courts interpreting *Lujan* have had little difficulty finding that the "breach of contract" due process remedy has no bearing in the public employee termination context. *DeBoer v. Pennington*, 287 F.3d 748, 749 (9th Cir. 2002) (common law breach of contract not adequate due process when "the deprivation constitutes a denial of a present entitlement."); *Sahlolbei v. Providence Health Care, Inc.*, 112 Cal.App.4th 1137, 1154-5 (2003) (when the right to pursue a gainful occupation is at stake, *Lujan* is of no applicability because the right to pursue gainful employment

is a "present entitlement"); *Pappas v. City of Lebanon*, 331 F.Supp.2d 311, 319 N.D. Pa. (2004) (collecting cases). The Opinion correctly held that Petitioners conferred an unqualified right to a contractual benefit to Baird and confirmed satisfaction of all conditions to receipt of that benefit by paying him for one year of the three year contract. The Opinion was absolutely correct in determining that a common law breach of contract does not adequately protect a public employee's procedural due process rights. Baird had possessed a present entitlement to continued employment.

It requires little citation to endorse the Opinion's view that in a public employee termination case, a state court breach of contract action can never satisfy the promptness requirement. This lawsuit was filed in the summer of 2001. In the business of civil litigation 60 days is a procedural blink of an eye. The normal course of civil litigation with full discovery takes a minimum of two years to run its course (in large metropolitan areas such as Cook County, one can easily double the time). No reasonable person can argue with a straight face that waiting for years, spending tens of thousands of dollars, and watching his contract expire and his career evaporate is what this Court intended in allowing a bare *Loudermill* hearing only when there is prompt post-termination judicial or administrative process. In real world, real time terms, to allow such a regime would be to destroy any meaningful due process to employees like Baird. There is an inherent inequality of bargaining power when a government with endless resources deprives somebody's sole source of income.

One of the most important reasons why the Seventh Circuit Opinion should stand is because it makes it clear that when a public body confers a present entitlement property right on a public employee, it cannot trample on those rights and then rely upon a taxing body's superior resources by

telling the devastated employee, "If you don't like it ... sue us ... we have more money than you and we will bleed you dry with litigation costs." The Opinion serves as a significant reminder that public bodies must play on a level constitutional playing field.

The Opinion is consistent with this Court's procedural due process decisions. As we demonstrate below, it is also consistent with the overwhelming weight of authority throughout the country.

B. There is no Circuit Split on the Question Presented. The Opinion is Consistent with the Overwhelming Weight of Authority Throughout the Country.

The Opinion is consistent with the overwhelming weight of federal and state authority interpreting *Loudermill*. These cases also make clear that what generally qualifies for as a "prompt post-deprivation hearing" falls into two categories: (i) a prompt post-termination administrative hearing such as civil service commission hearing, merit board hearing, or personnel board hearing; or (ii) a prompt grievance/arbitration hearing where the employee may contest his termination and obtain reinstatement and back pay. In the former case, the state legislature has engrafted the post-termination procedures onto a termination decision. In the grievance/arbitration setting, the public employer has agreed to provide full and prompt post-deprivation due process. When neither is present, the public employer must provide a full pre-termination hearing.

Seventh Circuit.

Our Seventh Circuit has had little difficulty in setting forth these rules. The landscape was clear years before this case was decided. In *Swank v. Smart*, 898 F.2d 1247 (7th Cir.

1990), *cert. denied*, 498 U.S. 853 (1990), the Seventh Circuit recognized the "sliding scale" of procedural protection to be provided depending on whether the public employer makes full post-termination process available. The Seventh Circuit (at 1256) specifically found "if there is no provision for a post-termination hearing ... the pre-termination hearing [must] provide all the procedural safeguards to which due process entitled a tenured public employee.... A first hearing need not provide a full set of procedural safeguards if there is a chance for a second hearing before termination." 898 F.2d at 1256. *See also Wainscott v. Henry*, 315 F.3d 844 (7th Cir. 2003).

Tenth Circuit.

As the Opinion sets forth, the Tenth Circuit reached the same conclusion on a nearly identical set of facts. *McClure v. Independent School District No. 216*, 228 F.3d 1205 (10th Cir. 2000). The court (at 1211) found that although "the hearing at issue was a pre-termination hearing, it was the only one provided to Mrs. McClure. Consequently, our due process inquiry is governed by the requirements applied to post-termination hearings." After examining prior precedent, the court found that in a case like this, procedural due process requires "confrontation and cross-examination of those whose word deprives a person of his livelihood." *See also California v. Gaines*, 982 F.2d 1470, 1476 (10th Cir. 1992) (*Loudermill* "established some form of a pre-termination hearing plus a full blown adversarial post-termination hearing [unless such as included as part of the pre-termination proceedings] are required."); *Copelain-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1254-5 (10th Cir. 2005) (where the "pre-termination process offers minimal opportunity for the employee to present her side of the case, the procedures in the post-termination hearing become much

more important"; such hearing must be provided by the employer at a meaningful time after termination.)

Sixth Circuit.

The Sixth Circuit has consistently held in a manner consistent with the Opinion. *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985). Of particular significance in the present context is the Fourth Circuit's more recent decision in *Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004). In *Mitchell*, a custodian with a protected property interest was fired by the school board after only a minimal pre-termination meeting. The court found a procedural due process violation because plaintiff "was not afforded a post-termination hearing; in fact [the school district] has no post-termination process." 375 F.3d at 481. *Mitchell* is significant because it rejects the "random and unauthorized" defense which Petitioners are really asserting in this case (because the State of Illinois judicial system might provide a partial remedy, that remedy cures a prior violation by the public employer). *Mitchell* correctly held that the due process deprivation was not the result of a random or unauthorized act. *Mitchell* clearly holds that because the board of education did not itself provide adequate post-deprivation due process, it must provide full pre-termination process.

Fourth Circuit.

The Fourth Circuit has long held that minimal pre-deprivation process is acceptable only if the terminated employee "is entitled to full administrative hearing with panoply of rights attaching to such hearing, and should he be dissatisfied with the administrative decision is entitled to a judicial review ..." *McClelland v. Massinga*, 786 F.2d 1205, 1213 (4th Cir. 1986); *Garraghty v. Commonwealth of*

Virginia, 52 F.3d 1274, 1283-1284 (4th Cir. 1995) (collecting cases).

State Courts.

The following state court decisions are consistent with the central holding of the Opinion that confrontation and cross-examination are necessary before the employer finalizes its decision. *Grice v. City of Kissimmee*, 697 So.2d 186, Fla.App. 5 Dist. (1997) ("if the city is going to terminate someone on the basis of the testimony of other witnesses, then the [employee] must as a matter of constitutional due process at some point – either at a pre-termination hearing or at a post-termination hearing – be permitted to confront those witnesses and cross-examine them."); *Case v. Shelby County Civil Service Merit Board*, 98 S.W.3d 167 Tn. Ct. App. (2002) ("... where the decision to terminate employment turns on determinations of issues of fact, due process requires an opportunity confront and cross-examine witnesses ..."); *Ohio Association of Public School Employees v. Lakewood City School District Board of Education*, 68 Ohio State 3d 175, 624 N.E.2d 1043 Ohio (1994) (collecting cases); *Colquitt v. Rich Township High School District No. 227*, 298 Ill.App.3d 856, 232 Ill.Dec. 924 (1st Dist. 1998); *Camlin v. Beecher Community School District*, 339 Ill.App.3d 1013, 274 Ill.Dec. 331 (3rd Dist. 2003).

Of course, Petitioners ignore all of these cases. These cases demonstrate an inescapable fact. When a public employer confers a property interest on an employee, that interest cannot be deprived without full procedural due process. In a case like this, where the employer provides no such process either pre or post-termination, a procedural due process violation occurs. A subsequently filed state court lawsuit does not cure that violation. In light of this background, Petitioners' contention (at 19) that the Opinion

"dramatically changes the landscape for all public bodies in the country" is nonsense.[1] Petitioners' contract-as-due process remedy argument makes no common sense. The Petitioners granted Baird the property interest. They didn't have to. It is they who have the responsibility of providing him due process before they finally deprive him of his property.

Loudermill and its progeny give public bodies two options. First, they can have an "initial check" pre-termination hearing and then terminate the employee if they have a compelling need to remove him from the premises. Under this scenario, they must then provide the employee with a post-termination hearing before the decision becomes final. Second, they could choose to provide a pre-termination hearing with the employee having the traditional rights of notice, confrontation and cross-examination.

Under either scenario, it is the public employer who has the obligation to provide due process. In simplest terms, these Petitioners want to shirk their duty to provide due process. Neither the Circuit Court of Jo Daviess County, nor the Northern District of Illinois is Baird's employer. The courts are present to correct due process violations, not to serve as a surrogate due process hearing body for this public body several years after the fact, long after the man's career is destroyed by the stigma of a for-cause termination.

Make no mistake. When it is stripped to the bone, Petitioners' position is abhorrent to the notions of fundamental

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[1] It is understandable why the attorneys for Petitioners are making such an overstated, irresponsible argument. After all, it was their advice which missed the constitutional mark by a country mile.

fairness which embody procedural due process. The Petitioners are asking this Court to approve an arrogant abdication of fairness. Petitioners would like this Court to endorse a "process" whereby a board could hire a superintendent, give him a contract, invite him to uproot his family and life, and then, on the merest whim, terminate that contract. Sure, the board would give him a pro forma, meaningless sham of a hearing (we'll pretend we'll listen to him, then we'll fire him). Deprive him of his income and his future job earning potential, and then dare the unemployed and disgraced employee to "take us to court."

We respectfully submit that the mean-spirited actions of Petitioners have no place in our democracy or this Court's jurisprudence.[2] The Opinion correctly balanced the competing interests in this case.

C. The Opinion Promotes Fairness and Federal Judicial Economy.

Perhaps one of the most important long-range observations of the Opinion is footnote 4. In articulating the various balancing factors inherent in a due process analysis, the Opinion appropriately concludes that by providing full pre-termination due process rather than providing minimal process and inviting a lawsuit, public bodies will actually act more responsibly and will conserve the public purse. It is "expensive and time consuming to hire and fire and so the

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[2] As we discuss more fully in our discussion of the qualified immunity issue, the Seventh Circuit's unusually strong language condemning the conduct of these Petitioners is well justified. The petition likewise demonstrates that a leopard doesn't change its spots.

government also has an interest in verifying that the purported 'cause' of termination is legitimate." It is "more efficient to ensure that a pre-termination hearing comports with due process when an employee to be terminated 'for cause' possesses a present entitlement than it is to defend a lawsuit."

We respectfully submit that this irony has been lost on Petitioners. By providing Baird with a constitutionally appropriate hearing, Petitioners could have saved hundreds of thousands of public dollars in litigation costs. It could have conserved its fiscal and administrative resources for far more important educational purposes. From an institutional standpoint, the Opinion really lies in the best interest of public bodies. By leaving the Opinion undisturbed, this Court will help to make sure that employment disputes will be resolved in state court where they belong.

Perhaps one of the best indicators of the correctness of the Opinion is that it has been applauded by at least one legal school law commentator Dowling-Sendor," "When Firing Backfires/If You Intend to Terminate an Employee ,You Have to Follow the Rules," *American School Board Journal*, April 2005, Vol. 192, No. 4; www.asbj.com/2005/04/0405schoollaw.html. The commentator concludes:

> Even though Baird could have pursued his rights to present and confront witnesses at a lawsuit, he would not have been able to obtain a prompt resolution of the termination dispute. To paraphrase Shakespeare, when it comes to termination disputes, "promptness is all." ... A discharge dispute can generate heated emotions but the procedures for resolving such a dispute must comply with rules established by the U.S. Constitution, state law and board policies. Indeed, it's the very danger that emotions might

> overwhelm reason and fairness that makes it essential to follow procedural rules that are designed to insure a full and fair inquiry.

The Opinion is an eloquent and decisive call to fairness. It should not be disturbed. It will be a boon to fair and honest decisionmaking in the public employment context.

D. The Opinion Correctly Found that the Individual Board Members were not Entitled to Qualified Immunity.

In assessing the Opinion's qualified immunity ruling, it is significant to note that the facts giving rise to the procedural due process claim are undisputed. Therefore, the matter was ripe for the Opinion's adjudication of this issue.

When an opinion of a Court of Appeals uses language such as found in this case, the egregiousness of the defendants' conduct is inescapable. Petitioners engaged in an "on the sly investigation" of Baird. Their "evaluation" document was really "accumulated tidbits of derogation." The conduct of the board members was at a minimum "petty and maladroit." Whatever minimal due process they were offering at the pre-termination hearing was "effectively emasculated" by their refusal to furnish Baird "with the names of district employees who had acted as undercover school board informants," and by their refusal to allow Baird to question board members about matters other than "to which they had spoken." Even if Baird had agreed to participate in this truncated forum, "the hearing would still have missed full due process by a country mile." The procedure they offered was "toothless." It was "a kangaroo court." Finally, it was clear that by the conduct of these board members "elementary fairness fell through the cracks."

Under these circumstances, the Opinion correctly found that the individual defendants were not entitled to qualified immunity. Quite apart from the horrible punitive conduct which the individual Petitioners actually evidenced, the simple fact of the matter is reasonable public officials should have known that Baird was entitled to considerably more process than what was provided in this case. *Loudermill* and *Gilbert* pointed the way. *McClure* decided just a year or so before this incident is precisely on point. There was plenty of Seventh Circuit and other circuit authority pointing the way. There was an abundance of state court authority.[3] Based on this overwhelming authority, the state of the law in 2001 gave Petitioners "fair warning that their alleged treatment of [Baird] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Plenty of Seventh Circuit precedent – not to mention *McClure* and the cases from other courts – pointed

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[3]In doing supplemental research for this petition response we continue to come upon other authority in the state courts for our position. In *Garner v. Michigan State University*, 185 Mich.App. 750, 462 N.W.2d 832, 837-8 (1990), the court found that *Loudermill* "clearly provides that the minimal pre-termination procedure which it outlined is not alone adequate to satisfy due process.... Subsequent federal decisions affirm that a post-termination hearing is required if the public employer elects to grant only a *Loudermill*-type pre-termination hearing. [Citations]. Because plaintiff was provided no post-termination process plaintiff was denied without due process his property right to continued employment...." *Garner* underscores an essential point. Any reasonable reading of *Loudermill* and its progeny compels a conclusion that significantly more process was required than was furnished here. A reasonable public official should have been on notice to almost two decades of interpretation of *Loudermill's* explicit caution.

the way to fairness. Petitioners chose a procedural hitching post approach to due process. They should answer in damages.

The Opinion correctly found and the authority cited above demonstrates that a reasonable public official should have known that procedural due process required more than what these Petitioners offered to Baird. The facts in this case are egregious. The Petitioners refused to provide Baird with the names of his accusers and refused to provide any meaningful opportunity to obtain or confront the evidence against him or cross-examine anyone about anything.

Under these circumstances, the Opinion correctly holds that it would be patently unfair to allow the presiding officers of the "kangaroo court" that "missed due process by a country mile" to escape potential personal liability. Baird should have his day in court and should be given an opportunity to present his evidence to a jury.

CONCLUDING REMARKS

In reviewing this petition, we ask the Court to consider the human elements in this case. Kelly Baird spent a quarter century working his way up the educational ladder. He moved from teacher to coach to principal to director to central office administrator. He finally reached the pinnacle of school superintendency. These jobs are few and far between.

His career has been wrecked by these petty and maladroit government officials. They smeared his reputation with "tidbits of derogation." They fired him without a semblance of the fundamental fairness due process requires. His career as an educational administrator is over. Instead of giving Baird a fair hearing, the individual Petitioners summarily

fired him and then said "sue me," knowing full well that they were being defended at taxpayer expense.

There is no reason to cry any tears for these people. Petitioners' characterization of these individuals as volunteers in jeopardy of losing their homes, their futures, and their families' financial well-being based on good faith decisionmaking is simply wrong. The doctrine of qualified immunity was specifically not intended to shield these public officials from the consequences of their meanspirited destruction of Kelly Baird's livelihood.

The Petitioners did not seek to stay the mandate of the Seventh Circuit. This matter is back before the district court. Kelly Baird should be allowed to present his case to a jury. By denying the petition and allowing the Opinion to stand, this Court will be significantly aiding reasonable and fair public sector procedural due process. Perhaps public bodies will now be more cognizant of their constitutional obligations, knowing now – with certainty – that in addition to providing *Loudermill* rights, they may need to provide *Baird* rights as well.

CONCLUSION

For the reasons set forth above the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 04-1303

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In the Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether an action for breach of contract constitutes adequate post-termination process for a contractual employee following a pre-termination *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) hearing, or whether, as the Seventh Circuit held, a breach of contract action is insufficient post-termination process where no remedy of reinstatement is available?
2. If a breach of contract action is not adequate post-termination process, was the employee's right to a full trial-type pre-termination hearing "clearly established" so as to deprive the individual defendants of qualified immunity, as the Seventh Circuit held?

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REASONS FOR GRANTING THE PETITION

A. Introduction

In their petition, Petitioners identified several key reasons why certiorari should be granted. First, the Seventh Circuit's decision imposes significant new burdens on public bodies and public officials, requiring full trial-type pre-termination hearings where the post-termination process is provided through a state court trial. The Seventh Circuit's decision to eliminate entirely the state courts as part of the process a state may provide to an employee facing termination should be reviewed by this Court before being imposed on state and local governments. If left to stand, the Seventh Circuit's decision will require local governments to conduct their own full trial-type hearings, rather than rely on the process provided by state courts, vastly increasing the financial and resource burdens on those public bodies.

Second, the Seventh Circuit's decision contains fundamental errors of law, by requiring school boards to provide significantly more process than *Loudermill* requires when terminating an employee whose rights arise solely out of his employment contract. Respondent's claim that this is a natural outgrowth of *Loudermill* simply misapprehends that decision and its progeny. *Loudermill* explicitly authorizes abbreviated pre-termination hearings where the *state* (not necessarily the school board itself) provides access to full post-termination process. The Seventh Circuit's ruling that a state court breach of contract action is not sufficient post-termination process is, in fact, inconsistent with that decision.

Third, the decision conflicts with decisions of other Circuits. Respondent ignores these conflicting cases, citing instead to others which he claims support the opinion below. Those decisions do not address the issue raised here – whether the post-termination procedures provided by a state court breach of contract action satisfy *Loudermill*'s

requirement for full trial-type process. Nor do they address the conflict identified in the Petition: that the Seventh Circuit's decision creates a new constitutional right, a "right to remain in the position," remediable only by reinstatement, which conflicts with numerous appellate decisions rejecting such a claim.

Finally, the Seventh Circuit failed to apply the correct standard with regard to the qualified immunity issue. Respondent never addressed that failure, arguing instead that, because the Seventh Circuit characterized these school board members as "petty and maladroit," no further analysis of their claim to qualified immunity was required. Respondent appears to be arguing for a return to the subjective bad faith standard rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), notwithstanding the fact that the Seventh Circuit did not make a finding of subjective bad faith. As this Court has repeatedly held, qualified immunity is an essential element of constitutional litigation, protecting public officials in the conduct of their responsibilities. This Court should grant certiorari not only on the procedural due process question, but also to ensure that the qualified immunity standard is properly applied in all federal courts, to protect all public officials, even those whom a court seems to dislike.

Because of the importance of the issues presented here, Petitioners repeat their request that the Court grant the petition for certiorari and settle these key questions of procedural due process and qualified immunity for local public officials.

B. This Case Raises Issues of Critical Importance and Contains Significant Errors of Law.

Respondent's brief, at least implicitly, acknowledges the importance of the Seventh Circuit's decision, by claiming that public employees will now have the benefit of something called "Baird" rights, over and above their *Loudermill* rights.

(Opp. at 28). Further, he identifies no other court which has faced this question – the sufficiency of a state court breach of contract remedy as post-termination process in an employment case, following a *Loudermill* pre-termination hearing. Nor does he explain his position that such a state court review could never constitute adequate post-termination process. Respondent claims that such a holding so clearly follows from this Court's prior decisions that no further consideration of it is necessary. The Petitioners respectfully disagree, both with that analysis and the conclusion. The Seventh Circuit's departure is not pre-ordained by *Loudermill*. To the contrary, *Loudermill* and numerous other decisions of this Court support the use of state court post-termination remedies.

The only facts relevant to the due process claim are those that relate to the process provided to Respondent.[1] Those facts clearly show that Petitioners provided well more pre-termination process than *Loudermill* required.[2] The only

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[1] Respondent begins his opposition with a colorful, if somewhat slanted, presentation of the facts leading up to his termination. Although Petitioners disagree with much of what was cited, this is not the proper forum in which to litigate the underlying question whether the School District had adequate cause to terminate the superintendent. That decision belongs, as the District Court concluded, before a state court hearing a breach of contract claim. Indeed, the recitation of "facts" presents, more clearly than any legal argument, a compelling case for determining that the appropriate, and indeed the only logical, post-termination proceeding should have been a breach of contract action where these facts could be finally determined.

[2] Rather than the "bare" notice that Respondent alleges, the School Board provided notice that included a detailed evaluation of the shortcomings in Respondent's performance, an evaluation that Respondent had refused to discuss with the Board. (App. 31a – 44a). The Board also informed Respondent that it would: provide documents, permit counsel to represent

question before the appellate court, under *Loudermill*, was whether sufficient post-termination process existed. The appellate court flatly rejected the notion that a state court breach of contract action, a remedy clearly available in this case, could satisfy the requirement for post-termination process.

Respondent argues that *Loudermill* and its progeny make the Seventh Circuit's ruling obvious. To the contrary, those cases call for the opposite result. The Seventh Circuit based its decision on the theory that, because Respondent was "presently entitled" to serve as Superintendent, this Court's decision in *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), precludes a breach of contract action as sufficient post-termination process. This holding is based on a misconception of *Lujan*. *Lujan* held that a post-termination breach of contract claim is sufficient, even with no pre-termination process, when the claimant has no ongoing employment relationship. The Seventh Circuit then assumed the converse to be true – that such post-termination relief cannot be sufficient when the claimant does have such a relationship, overlooking the critical distinction that in this case both pre- and post-termination process were provided. The appellate court and Respondent appear to miss the salient fact that the *Barchi-Lujan* line of cases (*Barry v. Barchi*, 443 U.S. 55 (1979)) looks at the appropriateness and promptness

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him at the hearing, allow him to question school board member witnesses (although it limited his cross-examination to the scope of the witness's testimony), and allow him to present his own witnesses and evidence and testify to what absent witnesses would have said on his behalf. (Plaintiff-Appellant App. at A.37, docketed by 7th Cir. 3/1/04). In spite of all of this, Respondent refused even to participate in the hearing, a refusal the appellate court forgave, even though the court found no bias in the school board.

of various post-termination remedies when those are the *only* remedies provided. They provide no support for the Seventh Circuit's wholesale condemnation of state court breach of contract relief as adequate post-termination process where pre-termination process is also provided.[3]

In *Loudermill*, the state provided an administrative hearing as its post-termination process, and this Court endorsed the sufficiency of such a system. Respondent never explains why an administrative remedy provides greater process than a judicial one, although that appears to be a key component of his argument. Indeed, this Court and lower courts have repeatedly acknowledged that state courts play an important role in satisfying the requirements of due process. In *Daniels v. Williams*, 474 U.S. 327 (1986), for example, the Court held that the proper remedy for a prisoner injured by a guard's carelessness was a state-law action for tort – and, in particular, that due process was not implicated so long as the state court process was available.

State judicial process has been recognized as an integral part of due process in other contexts, as well. In *Graham v. City of Philadelphia*, 402 F.3d 139 (3d Cir. 2005), the Third Circuit held that a state court acquittal on criminal charges satisfied any due process requirement for a "name-clearing" hearing to protect a liberty reputational interest. *See also Greene v. Finley*, 749 F.2d 467 (7th Cir. 1984). The Seventh Circuit also held that state procedures and remedies are an integral part of the due process calculus in *Strasburger v.*

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[3] Respondent has apparently chosen not to argue the merits of the Seventh Circuit's novel claim that an independent right of reinstatement is also created by its "present entitlement" theory. As Petitioners argue in their petition, this so-called right not only conflicts with numerous other appellate decisions, it also constitutes a significant misapprehension of the nature of the property interest involved in public employment.

Board of Education, 143 F.3d 351, 358 (7th Cir. 1998). "State law remedies in theory can satisfy due process as well as federal ones, so we require plaintiffs seeking federal remedies to show the state's remedies lacking." *Id.*

It besmirches the dignity of state courts to suggest - as the appellate court held here - that they are constitutionally incapable of providing adequate and prompt post-termination process. To the contrary, they are the most appropriate to address these disputes, where the property interest arises out of a contract and the issue is whether state contract law permits the termination. As Respondent himself admits, this Court should "help to make sure that employment disputes will be resolved in state court where they belong." (Opp. at 24). To the extent Respondent raises a concern regarding efficiency and judicial economy (Opp. at 23), that concern is best alleviated by allowing state courts to hear these disputes in the first instance.

Both the opinion below and Respondent attempt to justify the disparagement of the state courts by claiming that, as a matter of law, state court processes can never be prompt enough to satisfy due process in an employment case. This is clearly incorrect. In the cases discussed above, where court proceedings were considered as part of the state's provision of due process, normal court deadlines were not found to violate a party's due process rights. Further, Respondent has never provided any support for his claim that these cases will take a minimum of two years to try. He presents no citation to the record below, and indeed, cannot, as he presented no evidence below to support that assertion. To the contrary, the Department of Justice has found that in state courts sitting in the 75 largest counties in the country (which Respondent suggests were the slowest), 77% of contract cases tried to the bench (and 57% tried to a jury) are completed in less than the "minimum" two years of which Respondent complains.

Thomas H. Cohen & Steven K. Smith, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001,* Bureau of Justice Statistics Bulletin 8, Figure 2 (April 2004) (visited June 22, 2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>. Nor is there any basis upon which to conclude that the courts of Jo Daviess County – which is certainly not one of the country's 75 largest counties – could not resolve Respondent's claim for breach in a much shorter time. There is furthermore no reason to presume that a local state court, even with a full docket, would deny a reasonable request to expedite a particular case if a party made such a request. Thus, there is no basis to reject state court proceedings as adequate post-termination relief on the basis of timeliness of the relief.

The Seventh Circuit's decision in this case is based on a fundamental misconception of *Loudermill* and its progeny, and on a misapprehension of the role of state courts in providing the process due from the state in a fourteenth amendment claim by a public employee. For these reasons, this Court should grant the petition.

C. The Seventh Circuit's Decision Conflicts With Decisions of Other Courts of Appeals.

Respondent's second claim is that the Seventh Circuit's decision does not conflict with the decisions of other circuits, and indeed, he cites several cases which he claims support the court's decision below. He fails, however, to address the numerous cases cited by Petitioners demonstrating the conflict that exists. That conflict arises because the Seventh Circuit explicitly held that a public employee has a right to remain in office that can be protected only by a proceeding that can ensure reinstatement. This position has been clearly rejected by numerous courts of appeals, all of whom reject such a "right." Furthermore, this Court's decision in *Gilbert v. Homar*, 520 U.S. 924 (1997), clearly rejected this notion of